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Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 119

UNITED STATES OF AMERICA,
Appellant

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. ET AL.,
Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

Motion To Dismiss Or Affirm

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MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the grounds that the appeal is not within the jurisdiction of this Court, because the notice of appeal does not include a general statement of the offense, and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment and order of the district court entered on December 21, 1964, and reaffirmed on February 17, 1965, after hearing on a motion for reconsideration. The judgment dismissed an

indictment charging appellees with violation of Title 15, United States Code, Section 1.

At the hearing on defendants' motion to dismiss the indictment, Government counsel, without any reservation or limitation, offered in evidence, and read into the record, a letter written by counsel for defendants to the Department of Justice prior to return of the indictment. This letter protested the proposed criminal proceedings because the very activities which the Government then was seeking to penalize criminally had been thoroughly investigated by the Government ten or eleven years before and the Government had made no complaint at that time about such activities.

The district court held that the Government's evidence established its long-time knowledge of, and acquiescence toward, the business practices of defendants charged as violation of the antitrust laws. Accordingly, the Court ruled that, under the circumstances of this case, the Government was estopped from subsequently criminally prosecuting that to which it had tacitly given its prior approval, and ordered that the indictment be dismissed. Upon reconsideration, the court concluded that, in the particular facts and circumstances of this case, considerations of public policy required dismissal of the indictment, and reaffirmed its previous decision.

The notice of appeal filed by the Government in the district court does not contain any statement concerning the offense.

ARGUMENT

1. Motion to Dismiss

The Rules of this Court provide that the notice of appeal in a criminal case shall include a general statement of the offense.[1] The notice of appeal filed in the present case is completely lacking in any statement whatsoever relating to the nature or identification of, or other reference to, the offense. Therefore, the appeal is not within the jurisdiction of this Court, because not taken in conformity to its rules.[2]

2. Motion to Affirm

The fundamental legal principle that the Government may be precluded from criminal prosecution by the acts of its officials, under appropriate circumstances, was recently reaffirmed by this Court in *Cox v. Louisiana,* 379 U.S. 559 (1965). Cited in support of its decision was *People v. Ferguson,* 134 Cal. App. 41, 24 P.2d 965 (1933),[3] which reversed a conviction for violation of the California corporate securities law where defendant had relied upon

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[1] "The notice of appeal shall be in three parts: (a) It shall specify the party taking the appeal; shall designate the judgment or part thereof appealed from giving its date and the time of its entry; shall specify the statute under which the appeal to this Court is taken; and, if in a criminal case, shall include a general statement of the offense. . ." Rule 10 2(a).

[2] "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules." Rule 16 1(a).

[3] Cox vs Louisiana, at 569, n. 3.

the advice of state officials that his conduct was permissible. Evidence to show this reliance was "neither immaterial nor irrelevant and should have been received"[4] declared the California court.

In the case at bar, evidence showing reliance by defendants on the knowledge and acquiescence of Government officials was offered by the Government itself. No attempt was made by the Government at that time or at the subsequent rehearing to modify, restrict or limit in any way the proof it offered and which, construed in its entirety by the district court, was found to establish knowledge and conduct by the Government estopping it from criminal prosecution of defendants.

The sole issue presented by this appeal is whether the district court erred in dismissing the indictment. This depends entirely upon the particular facts and circumstances involved in this individual case. Manifestly such questions are not substantial and do not present "an important issue in the administration of criminal justice," as asserted in the Government's Jurisdictional Statement.

Moreover, such assertions concerning the impact of the decision below on general criminal law enforcement ignore the distinction this Court made in *Cox* between true criminal activity and conduct which requires some interpretation to determine whether it is or is not of-

[4] People vs Ferguson, 24 P2d, at 970.

fensive.[5] Particularly applicable here are the observations in *People v. Ferguson* on the vagaries of law relating to modern commercial life.[6] In the case at bar, too, appellees were accused of violating a law *malum prohibitum,* one directed at one of the most complicated phases of modern commerce. This law was and is subject to varied interpretations, and the uncontradicted evidence shows that appellees relied upon the implied approval of officials charged with enforcing the statute. The district court correctly found from the Government's own evidence that the action of its officials, under the particular circumstances of this case, were tantamount to such approval, and that the Government was therefore estopped from prosecuting these defendants.

CONCLUSION

The foregoing establishes that this appeal should be dismissed for failure of the notice of appeal to comply

[5] "Nor does this limited administrative regulation of traffic which the Court has consistently recognized as necessary and permissible constitute a waiver of law which is beyond the power of the police. Obviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery." Cox vs Louisiana, supra at 569.

[6] "However, it occurs to us that a different situation is here presented. The regulation which has not been complied with is malum prohibitum and not malum in se. It covers one of the most complicated phases of modern commercial life. The statute can be read strictly or liberally, according to the type of mind applied to it. . . If the appellant early in his real estate career found himself in honest doubt, notwithstanding his high education and legal accomplishments, went to the fountain head itself for information. . .we cannot believe the law so inexorable as to require the brand of felon upon him for following the advice obtained. The mere statement of the facts demonstrate that such strict construction would be unconscionable and more calculated to engulf the innocent, law-abiding business man than to punish the guilty . . ." People vs Ferguson, 24 P2d, at 970.

with the Rules of this Court, or that this appeal should be affirmed because the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

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